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No. 97-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION OF RESPONDENTS YOUKHANA AND COTA

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QUESTIONS PRESENTED

1. Whether a loitering ordinance is unconstitutionally vague when it prohibits two or more persons remaining in a public place whenever a police officer reasonably believes that one of the persons is a gang member who has "no apparent purpose."

2. Whether a loitering ordinance that prohibits two or more persons remaining in a public place whenever a police officer reasonably believes that one of them is a gang member who has no apparent purpose, (i) arbitrarily denies personal liberties of freedom of movement and association in violation of substantive due process; (ii) is substantially overbroad in violation of the First Amendment; (iii) impermissibly punishes status rather than conduct in violation of due process; and (iv) permits arrest without probable cause to believe that a crime has been or will be committed in violation of the Fourth Amendment.

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BRIEF IN OPPOSITION OF RESPONDENTS YOUKHANA AND COTA

Respondents James Youkana and Fernando Cota respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court opinion in this case. That opinion is not yet reported, but will be reported at 177 Ill. 2d 440, 687 N.E. 2d 53 (1997).

CONSITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment provides, in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble. . . ." U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "nor shall any State deprive any person of life, liberty or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. The Chicago gang loitering ordinance is set out in the appendix to the City's petition. Pet. App. at 60a-63a.

STATEMENT

The challenged ordinance in this case, which was adopted by the Chicago City Council in June, 1992, makes it a crime for two or more persons to remain in a public place if police reasonably believe that at least one person in the group is a gang member who has "no apparent purpose."

Prior to adopting the ordinance, a Council committee conducted hearings about conduct by street gangs that created problems in City neighborhoods. Chicago Police Deputy Superintendent Gerald Cooper, testified on behalf of the City. Among other things, he specifically addressed the question of whether existing laws were adequate to deal with the street gang problems that had been described in the hearings:

> ALDERMAN MOORE: Now, Alderman Steele has been asserting throughout the hearings that there are laws already existing on the books that address the problems that people have been testifying about today and Friday.
>
> Is that your assessment? Are there already laws and it's just a question of enforcement?
>
> MR. COOPER: I think there are already laws. I think there are already enough laws on the books at this point, criminal laws, criminal penalties which

> are much different than the ones that are articulated in the ordinance.
>
> But certainly, there is always going to be situations where there is no specific violation for or statute for, but for the most part and in the examples that people have been giving, but for the most part, I would think that 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.

Supp. R. II at 181-182.[1]

Respondents Youkhana and Cota were arrested and charged under the ordinance by complaint on June 15, 1993. Their motions to dismiss were granted on September 29, 1993. An Illinois trial court struck the ordinance down as unconstitutional. It ruled the law was vague, overbroad, and based criminal arrests on an individual's status. Appendix to Petition at 41a-59a (hereinafter, "Pet. App. ___"). The intermediate appellate court affirmed on these bases, and on the additional basis that the ordinance violated rights guaranteed under the Fourth Amendment. *Id.* at 20a-36a.

The Illinois Supreme Court again affirmed. It ruled the ordinance unconstitutionally vague. In particular, it held that the phrase "no apparent purpose" gives neither potential arrestees nor enforcing police officers guidance as to when a person's purpose for being in public is apparent. As a result, according to the Court, the ordinance leaves potential arrestees without guidance for conforming their behavior to the ordinance, and it vests in police officers absolute discretion in determining whom to arrest for violating the ordinance. The Court also concluded that neither the ordinance's requirement of gang membership nor its move on order cures its vagueness. As had the appellate court, the Illinois Supreme Court determined that the ordinance was not susceptible to a limiting construction because the City Council had intentionally drafted the ordinance as "exceptionally broad" to achieve its purposes. Pet. App.

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[1] The hearing transcripts were made a supplemental record in the state court proceeding and are cited here, as they are by the City, as "Supp. R."

at 16a.

The Illinois Supreme Court also held that the ordinance violates substantive due process. It observed that, among the personal liberties protected by the Due Process Clause are, *inter alia*, the right to freedom of movement and the right to associate with others. The Court found that the ordinance was an "arbitrary restriction" on these personal liberties. Pet. App. at 19a.

Finally, the Illinois Supreme Court observed, as had the trial and intermediate appellate courts, that the City is not helpless in its war against the criminal activity of gangs. It found that many of the activities that the City sought to deter through the ordinance already were prohibited by existing criminal laws. *Id.*

REASONS FOR DENYING THE WRIT

This Court should deny the City's petition because the question of whether a law that prohibits the conduct of mere loitering is unconstitutionally vague is one that this Court resolved many decades ago and about which there is no controversy. *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). The Illinois Supreme Court correctly held Chicago's loitering ordinance vague on the basis of these precedents.

Nor is there any substantial or meaningful disagreement among lower courts over this Court's loitering jurisprudence. These lower courts have struck down mere loitering laws, like Chicago's, in the few post-*Papachristou* cases that have arisen. And, as reflected in the Illinois Supreme Court decision, the lower courts also have developed the contours for constitutional loitering laws, requiring that such laws contain some overt act or criminal intent in addition to loitering to form the prohibited conduct. Pet. App. at 11a. When these lower court decisions are examined, it is apparent that there is no meaningful controversy among them that is raised by Chicago's ordinance and the decision below.

The Illinois Supreme Court's holding on substantive due process also is unremarkable. Recognizing the unlimited scope, lack of intent and broad prophylactic objective of the ordinance, the Court properly concluded that the law arbitrarily impedes the personal liberties of free movement and association because it renders persons unable to walk the streets or associate with others "regardless of whether they are actually gang members or have committed any crime." Pet. App. at 18a-19a. Contrary to the City's representation, Pet. at 18, the Court never found a "fundamental" right to loiter and, in fact, held that the ordinance did not survive the minimal level of scrutiny advocated by the City. Pet App. at 19a.

Finally, the Court should not review the decision below because there are other substantial grounds that make Chicago's ordinance unconstitutional. While not reached by the Illinois Supreme Court, the state appellate court and trial court properly held that the ordinance is overbroad, that it punishes status rather than conduct, and that it allows arrest without probable cause.

1. Chicago's loitering ordinance is unconstitutionally vague.

The void for vagueness doctrine requires that a penal statute define a criminal offense (a) with sufficient definiteness that people of ordinary intelligence can understand what conduct is prohibited, and (b) in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). The Illinois Supreme Court correctly held that the City's ordinance is unconstitutionally vague under each of these requirements. Pet. App. 14a, 15a.

Chicago's loitering law commands a police officer to order any group of two or more persons to disperse and remove themselves from the area if he reasonably believes one of the persons to be a street gang member who is loitering in a public place. Chicago Municipal Code § 8-4-015. Pet. App. at 61a-63a. The police officer may arrest anyone who does not "promptly obey" the order. Violations of the ordinance may result in a fine of as much as $500, imprisonment for as long as six months, and the requirement to per-

form as many as 120 hours of community service. *Id.*[2]

The central element of the offense, loitering, is defined as "to remain in any one place with no apparent purpose." Pet. App. at 61a. Though the ordinance contains many fatal defects, the inherent vagueness of its prohibition on mere loitering[3] alone renders it unconstitutional.

The ordinance fails to give adequate notice of what conduct is prohibited. In *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939), this Court enunciated the basic principles underlying the requirement of adequate notice: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Chicago's loitering ordinance fails to meet the requirement of adequate notice because people must "speculate as to [its] meaning." *Lanzetta*, 306 U.S. at 453. A loitering law that simply prohibits remaining in a place "without an apparent purpose" is so amorphous that people of ordinary intelligence cannot understand what it prohibits or how to comply with its requirement. In brief, they do not and cannot know what they must do to demonstrate to an observing police officer that they are being purposeful while in public. Thus, the City's ordinance is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates*, 402 U.S. at 614 (1971) (striking down as vague an ordinance that made it "unlawful for three or more persons to assemble on any of the sidewalks, and there conduct themselves in a manner annoying to persons passing by").

This absence of any standard of conduct was well stated by the Illinois Supreme Court in its cogent explanation of the difficulty in making one's purpose for being in public places "apparent":

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[2] Penalties in the consolidated cases ranged from 1 to 27 days of incarceration. Morales, R.23, 24; Guitierrez, R.32, 37.

[3] The Illinois Supreme Court described mere loitering laws like the Chicago ordinance as ". . . broadly worded criminal loitering laws which prohibit loitering without additional unlawful conduct . . . ." Pet. App. at 8a.

> People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a job, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.

Pet. App. at 10a.

Moreover, while it is nearly impossible for persons to know how to make their purposes for being in a public place "apparent," the City's rigid enforcement policy gives potential arrestees no opportunity to avoid the inevitable effects of this vagueness. Persons who wish to inform an officer that they are waiting for a taxi (which may take some time on the south side of Chicago), or for a friend or family member to arrive, will confront the harsh reality that, in the City's words, "it is immaterial [to enforcement of the ordinance] whether an individual may be able to explain his presence in a public place to the satisfaction of a police officer." City Ill. Sup. Ct. Br. at 52.

This Court first recognized the inherent vagueness of a prohibition on mere loitering, like that contained in the Chicago ordinance, in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965). The ordinance forbade "any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on." *Id.* at 90. "The constitutional vice of so broad a provision needs no demonstration," this Court wrote and it condemned the ordinance, as written, because it "does not provide for government by clearly defined laws . . . ." *Id.* (quotation omitted). The Illinois Supreme Court relied upon *Shuttlesworth* in holding Chicago's law vague, noting that the proscriptions of the *Shuttlesworth* ordinance are "essentially the same" as the Chicago law. Pet. App. at 13a.

Though Chicago's ordinance does define "loiter" as "to remain in

any one place with no apparent purpose," that definition simply mirrors the dictionary meaning of loitering,[4] and provides no additional clarity to the loitering prohibition. This point is exemplified in *Papachristou*, which was this Court's next encounter with a vague law seeking to criminalize, *inter alia*, various acts of loitering. In *Papachristou*, the Court struck down an ordinance under which several of the defendants had been charged with loitering and which criminalized, much like Chicago's ordinance, the act of strolling from place to place "without any lawful purpose or object." 405 U.S. at 164. The Court held that this quoted language not only failed to provide sufficient notice, but to the contrary may simply be a "trap for innocent acts." *Id.* The Court explained further that "[t]he Jacksonville ordinance makes criminal activities which by modern standards are normally innocent." 405 U.S. at 163.[5]

As in *Shuttlesworth* and *Papachristou*, the broad proscriptions of the Chicago ordinance make it impossible for persons to know whether they are complying with the law while engaging in their general everyday activities. For example, staff of the City's Corporation Counsel testified in City Council hearings that the scope of the law

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[4] *See, e.g.*, Random House Dictionary of the English Language 843 (1971) (defining "loiter" as "[t]o linger aimlessly or as if aimlessly in or about a place"). *See also People v. Bright*, 520 N.E. 2d 1355, 1359 (N.Y. 1988) ("[t]he term 'loiter' or 'loitering' has a commonly accepted meaning that has evolved over the years, and connotes the act of remaining about or hanging around a place without any apparent purpose.")

[5] The City argues that criminalizing what may commonly be innocent acts is within its power and that injecting what types of conduct should be deemed innocent and inoffensive into the vagueness doctrine is misplaced. Pet. at 17. The City is correct if it means simply to suggest that whether innocent acts can be made criminal in a sufficiently precise ordinance is a substantive due process question and not a matter of vagueness analysis. However, neither this Court in *Papachristou* nor the Illinois Supreme Court here acted to the contrary. Both courts properly observed in their vagueness analysis that where a law employs vague language and its scope includes a broad range of everyday human activity, it becomes impossible for people to go about their everyday "innocent" endeavors and know whether they are violating the law. The Illinois Court never said that some species of "loitering" could not be made criminal. To the contrary, it only said that Chicago had failed on vagueness grounds in trying to do so.

could include prosecuting a gang member's family for loitering even when "they are outside their apartment building getting some fresh air." Supp. R. II at 231. Thus, a family escaping the heat of their apartment on a hot August evening is not sufficiently purposeful, in the City's estimation, if they are in the company of their son who is reasonably suspected of gang membership.

In addition the City presented examples in the courts below of the proper enforcement of the ordinance that encompass not only "innocent acts," but also conduct protected by the First Amendment. As noted in the trial court opinion, the City admitted that the ordinance would require the arrest of three members of the Northwest Community Federation who were talking to a gang member in front of a 7-Eleven store in an effort to persuade the gang member to leave the gang. Pet. App. at 57a. Similarly, in the Illinois Supreme Court, the City stated that if a gang member is loitering in public, the ordinance applies to him and his associates even if they are debating the constitutionality of the ordinance itself. City Ill. Sup. Ct. Br. at 43. ("The ordinance applies equally to gang members and their contacts whether a member of the Latin Kings is planning the next drive-by shooting with his co-conspirator or is debating the constitutionality of the ordinance itself.")

These examples show that the Illinois Supreme Court appropriately condemned this vague ordinance that included "normally innocent acts" within its scope. They also demonstrate that the ordinance is so inherently vague that the City itself does not know what it means or how to enforce it. Indeed, its own examples of appropriate enforcement of the ordinance are internally inconsistent. Though the City has argued that protected expressive conduct will have an apparent purpose and falls outside the scope of the ordinance, Pet. at 22 n.19, in both of the instances above, the persons are engaging in such conduct and yet the City has said it would arrest them for loitering.

Finally, it is not only suspected gang members who will be caught in the snares of the ordinance. Persons in the company of gang members, including family members, and even persons who do not know of the gang members' status, are subject to arrest and prosecution under the ordinance. This extension of the scope of the law to wholly innocent and unknowing companions of suspected gang members

also was condemned by the Illinois Supreme Court. Pet. App. at 10a.[6]

Not surprisingly, many courts have invalidated loitering laws containing prohibitions very similar to the "no apparent purpose" language of Chicago's ordinance. *See Timmons v. City of Montgomery, Ala.*, 658 F. Supp. 1086, 1089 (M.D.Ala. 1987) (invalidating ordinance that prohibited loitering "without apparent reason or business"); *Kirkwood v. Loeb*, 323 F. Supp. 611, 616 (W.D. Tenn. 1971) (invalidating that portion of a loitering statute that prohibited loitering "without legitimate business or purpose"); *People in Interest of C.M.*, 630 P.2d 593, 596-97 (Colo. 1981) (invalidating a statute that prohibited loitering in or about school grounds without a "specific, legitimate reason"); *State v. Richard*, 836 P.2d 622, 624 (Nev. 1992) (invalidating a statute that prohibited loitering on private property when loiterer has no "visible or lawful business").

The Illinois Supreme Court's decision was, therefore, a correct and entirely predictable ruling in light of the inherent vagueness of Chicago's ordinance and the substantial body of precedent — including the decisions of this Court in *Papachristou*, *Shuttlesworth* and *Coates* — holding that a mere loitering ordinance provides inadequate notice of what conduct it would prohibit.

Though the "no apparent purpose" language of the ordinance was explicitly condemned by the Illinois Supreme Court, Pet. App. at 9a-10a (as well as by the intermediate appellate court, Pet. App. at 31a-33a, and by the trial court, Pet. App. at 48a-49a), the City has chosen not to address this glaring defect in its petition. Instead it argues that persons actually do receive constitutionally adequate notice of

[6] The actual experience of two of the respondents in the consolidated cases make clear how far the ordinance reaches. Respondent Gregorio Gutierrez spent nearly a month in the Cook County Jail because his purpose in standing on a sidewalk with his brother to eat sandwiches from a local take-out joint was not sufficiently apparent to either the arresting officer or to the trial court. Gutierrez, R. 8-30. And respondent Jesus Morales was observed to be "[t]alking to citizens on the street," but neither the arresting officer nor the trial court deemed that purpose to be sufficiently apparent to escape an arrest and conviction under the ordinance. Morales, R. 6-21.

what conduct is prohibited because persons cannot be arrested until they refuse to obey a police officer's order to move on. Pet. at 11-12.

However, the requirement of a move on order does not mitigate the failure adequately to define the central element of the offense. It simply puts innocent persons in the position of having "to disperse and remove themselves from the area" or face arrest and prosecution without having the faintest idea of what they did wrong. Even more important, persons still will not know what they must do in the future to avoid being prosecuted under the ordinance. Thus, notice to disperse on pain of arrest does not comport with this Court's mandate that persons "are entitled to be informed as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 451, 453.

Moreover, the Illinois Supreme Court properly noted that the City's position is directly inconsistent with this Court's teaching in *Shuttlesworth*. Pet. App. at 13a. Under *Shuttlesworth*, a mere loitering law that only notifies a person that he acts illegally if he does not move on is a law that is unconstitutionally vague. *See supra*, at 7. *See also Wright v. Georgia*, 373 U.S. 284, 291-92 (1963) ("one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution"); *Kirkwood*, 323 F. Supp. at 616 (sections of ordinance that "are conditioned upon the failure to `move' when directed to do so by a policemen . . . make an individual's continued presence on a public street conditioned upon the permission of a policeman" and are unconstitutionally vague and overbroad).

Notwithstanding *Shuttlesworth*, the City argues that *Colten v. Kentucky*, 407 U.S. 104 (1972) is "dispositive" as to the constitutionality of loitering ordinances that contain move on order requirements. Pet. at 11. It is mistaken. *Colten* concerns a disorderly conduct statute that defined with a specific intent requirement the underlying conduct that it made subject to an order of dispersal: "[acting] with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof . . . ." *Colten*, 407 U.S. at 108. In the Court's view, a person of ordinary intelligence can and would understand the conduct prohibited by this statute — it certainly is not "apparently" aimless conduct. There is nothing in *Colten* that re-

motely suggests that the dispersal component of the ordinance was germane to the Court's analysis. Nor is there the slightest hint in *Colten* that a move on order can save an otherwise vague loitering ordinance.

In sum, the dispersal requirement does nothing to prevent the Chicago ordinance from being a prohibition on mere loitering and from therefore failing to notify persons of ordinary intelligence as to what conduct it prohibits.

The ordinance also fails the second, and more important, prong of the vagueness doctrine, namely, the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender*, 461 U.S. at 358. The Illinois Supreme Court correctly recognized that the ordinance provides no such guidelines and allows "absolute discretion to police officers to decide what activities constitute loitering." Pet. App. at 15a. Because the ordinance vests such discretion in police officers, it encourages arbitrary or discriminatory enforcement, and is therefore unconstitutionally vague. *Kolender*, 461 U.S. at 357.

In condemning the loitering law in *Shuttlesworth*, this Court described the unfettered discretion given to law enforcement under a loitering law as allowing a person to remain on a public sidewalk "only at the whim of any police officer of that city." 382 U.S. at 90. Chicago's prohibition criminalizing being in a public place with "no apparent purpose" leaves police officers with the same unfettered discretion. As the court in *Timmons* observed:

> How does one initially determine when a person is loitering or wandering without 'apparent' reason or business? Is it by the person's gait, posture or countenance? Or is it by the person's dress or apparent wealth or poverty —or race or nationality? What is 'apparent' idle conduct will vary depending upon the personal experiences and prejudices of the person viewing the conduct; in other words, what conduct is 'without apparent reason or business' can only be in the 'eye of the beholder.'

658 F. Supp. at 1089. Lacking any enforcement standards, the ordinance permits a "standardless sweep [that] allows policemen . . . to pursue their personal predilections." *Kolender*, 461 U.S. at 358

(citation omitted). *See also Nunez v. City of San Diego*, 114 F.3d 935, 943 (9th Cir. 1997) (an ordinance's prohibition that relies "on the police officer's perception of whether conduct is aimless" is standardless).

The City argues that because "an arresting officer must satisfy an objective test for identifying which groups of loiterers are subject to the ordinance," the ordinance adequately limits police discretion and so survives a vagueness challenge. Pet. at 10. This is an alarming view of due process (and the proper role of law enforcement) under which vague penal laws are allowed to be enforced as long as their scope is restricted to certain groups of persons and their associates. Sadly, it only serves to underscore this Court's concern that a vague loitering law "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Kolender*, 461 U.S. at 360 (quoting *Papachristou*, 405 U.S. at 170.)

Though objective standards for determining against whom a law may be enforced are constitutionally necessary, a law (of which Chicago's ordinance is a striking example) that fails adequately to specify the underlying conduct it prohibits — no matter how clearly it delineates its targets — still vests unfettered discretion in police officers. *See, e.g., Ricks v. District of Columbia*, 414 F.2d 1097, 1100, 1105 (D.C. Cir. 1968) (part of statute prohibiting any "pickpocket, thief, burglar, confidence operator, or felon" from loitering held to be standardless and thus unconstitutionally vague). In rejecting the City's argument below, the Illinois Supreme Court wrote: "... although the general police order goes to great lengths to define criminal street gangs, it does absolutely nothing to cure the imprecisions of the definition of the "loitering" element of the crime." Pet. App. at 16a. Such a law remains, for that reason, unconstitutionally vague.

In short, precisely because the Chicago ordinance sets no standard with its prohibition on being in public with "no apparent purpose," it fails to provide guidance to police officers as to how or when to enforce it even with respect to the subset of the general population to which it applies. No amount of tinkering with, or interpreting, *other* parts of the ordinance will cure this underlying and fatal grant of unfet-

tered discretion to police officers; and thus no amount of such tinkering can save the ordinance from unconstitutionality.[7]

While this Court has recognized the legitimacy of the government's interest in fighting crime it has been steadfast in its commitment to the requirements of Due Process. As Justice O'Connor wrote for the Court in *Kolender*, "[a]s weighty as this concern [with curbing criminal activity] is, ... it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." 461 U.S. at 361.

2. There is no lower court disagreement as to the constitutionality of laws that seek to prohibit mere loitering.

The City devotes a substantial portion of its petition attempting to establish that there is a split among lower courts over the constitutionality of both loitering laws based on the Model Penal Code ("MPC-based ordinances") and loitering laws that include an intent to engage in a particular crime. It then argues that these alleged disagreements somehow implicate the Illinois Supreme Court decision striking down Chicago's mere loitering ordinance. Pet. at 14-18.[8] The City, however, is mistaken on both points.

First, in striking down Chicago's ordinance, the Illinois Supreme

[7] Because of this intended vagueness in the ordinance, the Illinois Supreme Court refused to give the law a limiting constriction. Pet. App. at 16a. The Court wrote:

> ... Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets. *Id.*

[8] In addition, the City discusses ordinances that purport to regulate noise, cruising, and sleeping in public places. But these are not loitering ordinances; and whatever difficulties (if any) lower courts have had in determining the constitutionality of such ordinances are irrelevant to the question of whether a mere loitering ordinance can pass constitutional muster.

Court did no more than follow this Court's decisions clearly establishing that a criminal prohibition on mere loitering is unconstitutionally vague.[9] Since *Papachristou*, there has been no controversy whatsoever over that proposition. Indeed, the clarity of this rule has resulted in very few mere loitering ordinances even being litigated. When such laws have been litigated, they have been struck down on vagueness grounds. *See Kirkwood*, 323 F. Supp at 616; *People in Interest of C.M.*, 630 P.2d at 596-97; *Richard*, 836 P.2d at 624.

Because there is no controversy as to the rule of decision correctly applied by the Illinois Supreme Court to strike down the Chicago ordinance, any lower court disagreement over the constitutionality of some *other* kind of loitering ordinance has no relationship to any controversy that could properly be before this Court by issuing a writ of certiorari in this case.

Second, the City overstates the extent of lower court disagreement about these other loitering laws. The clear consensus, adhered to and explained by the Illinois Supreme Court, is that a loitering law will be constitutional where a sufficiently defined "second specific element" such as "some other overt act or criminal intent" is joined to the act of loitering "to form the prohibited conduct." Pet. App. at 11a.

When viewed in this context, the alleged split in the specific intent cases evaporates. The courts that have struck down loitering ordinances with additional intent elements have done so simply because the added elements in the particular laws were not clearly defined. *See, e.g., Brown v. Municipality of Anchorage*, 584 P.2d 35, 37-8 (Alaska 1978) (list of circumstances to be considered in determining if a person manifested a purpose to engage in prostitution ineffective to clearly delineate prohibited conduct); *Wyche v. State*, 619 So.2d 231, 237 (Fla. 1993) (same); *Akron v. Rowland*, 618 N.E.2d 138, 146 (Ohio 1993) (list of circumstances that may be considered to determine if a person manifests a purpose to engage in drug-related activity, because it was not exhaustive, caused a "lack of specificity .

[9] The Illinois Supreme Court recognized that the Chicago ordinance remains a mere loitering ordinance despite its gang membership and move-on order requirements. As we show in Section 1 neither of these requirements alters the fact that the central element of the offense, loitering, suffers from fatal vagueness.

. . fatal to the ordinance"). There is no suggestion in any of these cases that a loitering ordinance joining a sufficiently defined intent element to loitering in order to define the criminal act, would not satisfy due process.

As to cases confronting MPC-based ordinances, the cases that do uphold such ordinances recognize the rule embraced by the Illinois Supreme Court;[10] and the sole controversy between them and the courts striking down MPC-based ordinances is whether the additional element supplied by such ordinances is also vague.

Consequently, there is no significant disagreement amongst the lower courts as to the constitutionality of a loitering law that adds a second specific, and clearly delineated, element to the conduct of loitering. But, in any event, the Chicago loitering ordinance presents no occasion for this Court to consider that issue. The Chicago ordinance is a mere loitering ordinance, the unconstitutionality of which is simply not in doubt under this Court's decisions.[11]

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[10] *See, e.g., State v. Ecker*, 311 So.2d 104, 107 (Fla. 1975) ("[w]e readily recognize that if the statute broadly proscribed loitering or idling, without more, it would be unconstitutional"). *See also Salt Lake City v. Savage*, 541 P.2d 1035, 1038 (Utah 1975).

[11] The Chicago ordinance is obviously void for vagueness even under the proposal made by Debra Livingston in *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum. L.Rev. 551, 669 (1997), an article cited with approval by the City. Pet. at 18, 23, 25. Professor Livingston suggests that laws that are "reasonably specific," and regarding which "legislatures or police departments have taken reasonable steps to narrow the opportunity for arbitrary police enforcement" should withstand vagueness challenges. 97 Colum L. Rev. at 669. In addition, and quite ironically, two of the other commentators cited by the City specifically discuss the Chicago ordinance, and argue that, as it stands, it is void for vagueness. *See* Peter W. Poulos, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 Calif. L. Rev. 379, 408-13 (1995) (suggesting the addition, *inter alia*, of an overt act element to the ordinance); Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 Chicago-Kent L. Rev. 461, 485-88 (1993) (suggesting, in addition, that adding intent and overt act elements will render loitering ordinances safe from vagueness attacks).

3. The ordinance violates substantive due process.

The Illinois Supreme Court correctly held that the gang loitering ordinance violates substantive due process. The Fourteenth Amendment's guarantee of due process of law includes a substantive component that "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). However, even where fundamental rights are not at stake, substantive due process safeguards personal liberties — including the freedoms of movement and association identified by the Illinois Supreme Court — against arbitrary governmental action by requiring that laws and regulations that would abridge them be, at the very least, "rationally related to legitimate governmental interests." *Washington v. Glucksberg*, ____ U.S. ____, 117 S. Ct. 2258, 2271 (1997); *see also Swank v. Smart*, 898 F.2d 1247, 1251-52 (7th Cir. 1990). Contrary to the City's representation, Pet. at 18, the Illinois Supreme Court did not conclude that there is a fundamental right to loiter. Rather, it correctly determined that Chicago's ordinance violates substantive due process even under the lenient standard of review advocated by the City. Because the ordinance fails the very test urged by the City, its petition should be denied.

This Court has long recognized freedom of movement as an integral component of personal liberty. Nearly a century ago, the Court observed that "[u]ndoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment . . . ." *Williams v. Fears*, 179 U.S. 270, 274 (1900).

It is likewise well established that loitering ordinances restrain this right to freedom of movement. *Territory of Hawaii v. Anduha*, 48 F.2d 171, 172 (9th Cir. 1931). Indeed, this Court recently expressly recognized that a loitering ordinance before it (similar to Chicago's) "implicate[d] consideration of the constitutional right to freedom of

movement." *Kolender*, 461 U.S. at 358. *See also Shuttlesworth*, 382 U.S. at 96 (Douglas, J., concurring) ("[f]ailure to obey [a police officer's order to move on], when one is not acting unlawfully, certainly cannot be made a crime in a country where freedom of locomotion is honored") (citation omitted).

Several recent lower court decisions considering constitutional challenges to curfew ordinances have similarly identified freedom of movement as an integral aspect of personal liberty protected by the Fourteenth Amendment's Due Process Clause. *See Nunez*, 114 F.3d at 935, 944, 948-49; *Hutchins v. District of Columbia*, 942 F. Supp. 665, 670-71, 674, 680 (D.D.C. 1996); *Waters v. Barry*, 711 F. Supp. 1125, 1134, 1139-40 (D.D.C. 1989); *Gaffney v. City of Allentown*, No. CIV-A-97-4455, 1997 WL 597989, *5, *8 (E.D. Pa. Sept. 17, 1997). Thus, far from being the maverick the City paints it, the Illinois Supreme Court aligned itself squarely with this Court and others when it recognized that the City's ordinance abridges the right to freedom of movement.

This Court also has long afforded considerable constitutional shelter to the related freedoms of assembly and association. In *DeJonge v. Oregon*, 299 U.S. 353, 365 (1937), for example, the Court unanimously held that:

> [C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

Subsequently, in holding unconstitutional a municipal ordinance that prohibited persons from assembling on a sidewalk and conducting themselves in a manner annoying to persons passing by, the Court explained that were the rule any different, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension . . . ." *Coates*, 402 U.S. at 615. *See also Kolender*, 461 U.S. at 358 (recognizing danger to First Amendment in striking down loitering ordinance).

This right is abridged by Chicago's ordinance because the law permits the dispersal or arrest of a gang member and his companions who are associating in public to debate the constitutionality of the ordinance, or of community workers who are associating with a gang member in an outreach program. Pet. App. at 57a. *Supra*, at 9. Moreover, gang members cannot publicly associate even with members of their immediate family without being subject to confrontation and arrest. Indeed, they may not associate with their relatives in as basic an aspect of life as getting some fresh air together outside their apartment. *Supra*, at 8-9.

The City's reliance on *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), is misplaced for the simple reason that, as just shown, Chicago's ordinance restricts by its terms much more than "chance encounters" of the sort at issue in *Stanglin*. More importantly, as the Illinois Supreme Court correctly recognized, even those forms of association outside the core of the First Amendment are protected by the Fourteenth Amendment against such unreasonable and arbitrary governmental action as the ordinance here. Pet. App. at 18a-19a. *See also Swank*, 898 F.2d at 1251-52.[12]

Nor is the City aided by *People ex rel. Gallo v. Acuna*, 60 Cal. Rptr. 2d 277 (1977), *cert. denied*, 117 S. Ct. 2513 (1997). The *Acuna* court reviewed, for abuse of discretion only, a narrowly tailored civil injunction, issued pursuant to the state's public nuisance statute, that proscribed specific conduct by certain defendants in a four-square-block neighborhood. *Id.* at 282-83, 295-96. Moreover, its analysis of associational interests was highly contextual,

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[12] Nor does *Colten v. Kentucky*, 407 U.S. 104 (1972), advance the City's cause. That case involved a disorderly conduct statute that, unlike Chicago's ordinance, required a specific intent to "cause public inconvenience, annoyance or alarm," and the defendant there was convicted for failing, after five warnings, to leave the crowded roadside scene of a traffic violation. 407 U.S. at 108-109. The Court's holding as to the First Amendment was limited to its conclusion that the "defendant had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time." *Id.* at 109.

amounting in short to the conclusion that "the First Amendment [did not] protect the collective public activities of the gang members within ... [the particular four-block neighborhood involved], activities directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence." *Id.* at 289. Consequently, the City's reliance on *Acuna* to support its blanket prohibition on simple loitering is sorely misplaced. [13]

Thus the Illinois Supreme Court was justified in concluding that the ordinance impedes upon the rights to freedom of movement and association — personal freedoms protected under the Due Process Clause. It was equally justified in rejecting the ordinance as unconstitutional on the minimal ground that it constitutes "an *arbitrary restriction* on personal liberty... [because] [p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." Pet. App. at 18a-19a (emphasis supplied). *See Glucksberg*, 117 S. Ct. at 2271 (the Constitution requires at a bare minimum that laws impeding on personal liberties protected by the Due Process Clause "be rationally related to legitimate government interests").

The Illinois Supreme Court's decision is anchored in precedent as well as in logic. Time and again, this Court and others have rejected "prophylactic" justifications for laws, like Chicago's ordinance, that broadly trample constitutional freedoms. *Papachristou*, 405 U.S. at 171. Moreover, the Illinois Supreme Court is not the first tribunal to conclude that a wholesale deprivation of constitutional liberties in the name of crime prevention is too far divorced from any legitimate governmental interest to pass muster even under mere reasonableness review. In *Fenster v. Leary*, 229 N.E.2d 426 (N.Y. 1967), for

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[13] The City's remaining cases, *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996), and *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990), merit the short shrift the City pays them. *See* Pet. at 21. Both cases involved ordinances narrowly targeted at particular forms of disruptive conduct (sitting and lying in the sidewalk and vehicular cruising, respectively) during limited times and in limited places. Neither case involved anything like the sweeping, admittedly "prophylactic" measure the City champions here. *See Roulette*, 97 F.3d at 302; *Lutz*, 899 F.2d at 256-57, 270.

example, the New York Court of Appeals reviewed a vagrancy statute whose primary targets were "alcoholic derelicts and other unfortunates" and "suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected," *id.* at 430. The court struck down the statute, concluding that it was not reasonably related to legitimate ends of government and, accordingly, "violate[d] due process and constitute[d] an overreaching of the police power," *id.* at 428. Likewise, in invalidating a loitering ordinance similar to the one at issue here, the Oklahoma Court of Criminal Appeals explained that "[t]o forbid people from being on public streets as a preventive measure rings of a totalitarian police state operated for the efficiency of the government and not in the interest of a free people. All citizens are justly concerned about crime. But, that concern must take rational expression and not become a mindless fear that erodes the rights of a free people." *Hayes v. Municipal Court*, 487 P.2d 974, 980 (Okla. Ct. Crim. App. 1971). *See also Gordon v. Schiro*, 310 F. Supp. 884, 886-87 (E.D. La. 1970) (vagrancy ordinance); *Alegata v. Commonwealth* 231 N.E.2d 201, 205-10 (Mass. 1967) (loitering and vagabond ordinances).

Because the Illinois Supreme Court correctly determined that Chicago's ordinance violates substantive due process even under the minimal level of scrutiny advocated by the City, its petition should be denied.

4. The ordinance also violates other rights.

Chicago's loitering ordinance is unconstitutional not only because it is vague and violative of substantive due process, but also on the additional grounds — not reached by the Illinois Supreme Court — that it is overbroad, punishes status rather than conduct, and permits arrest without probable cause to believe that a crime has been or will be committed. All of these constitutional infirmities were recognized by the Illinois Appellate Court. Pet. App. at 2a, 33a, 35a.

First, a statute (or ordinance) is unconstitutionally overbroad when it reaches a "substantial" amount of constitutionally protected con-

duct. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Mere loitering laws unquestionably suffer from this vice. This Court recognized that the loitering law in *Shuttlesworth* was "[i]nstinct with its ever-present potential for arbitrarily suppressing First Amendment liberties . . . ." 382 U.S. at 90-91. And, the Court echoed this theme in *Kolender* where it again dealt with a broadly worded loitering law. 461 U.S. at 358. *See also Coates*, 402 U.S. at 615-16 (ordinance violated rights of assembly and association).

Application of the loitering ordinance would cut a wide swath through the First Amendment's protection of freedom of speech and association. Subject only to the individual police officer's determination whether a particular group of persons sufficiently manifested an "apparent purpose," the ordinance would permit the arrest of any group reasonably believed to include a gang member regardless what the actual reason for their presence might be. Thus, as the trial court below rightly observed, the ordinance would subject to arrest a social worker talking to a gang member on the street, as well as two friends who passed on the street and stopped for a brief conversation. Pet. App. at 57a. And, as explained above, the City itself acknowledges that the ordinance would apply where persons were engaged in protected expressive association. *Supra*, at 9.

The City contends that the ordinance would "rarely if ever" apply to protected expression because activities such as "picketing or protests" would have purposes apparent to police and therefore not be perceived by police as loitering. Pet. at 19. This is precisely the sort of delegation this Court has condemned as "entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (quoting *Gregory v. Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)). Beyond that, however, the City's argument asks this Court to find in the ordinance an ill-defined exception for First Amendment activities that is nowhere found in its text or in any binding judicial or administrative construction of its text. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 & n.11 (1988). Moreover, it is far from self-evident that the purposes of even the expressive activities the City identifies would be "apparent" to police. Finally, and most important, First Amendment protection is not limited to

picketing and protests, *see, e.g., Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569, 575 (1987), and one need look no further than the City's own statements to see that the ordinance would apply even to peaceable association for lawful debate and other expressive activities.[14]

Second, the gang loitering ordinance unconstitutionally criminalizes status because it permits arrest and conviction in the complete absence of any prohibited *actus reus*. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *Powell v. Texas*, 392 U.S. 514, 533 (1968). The City argues that the ordinance criminalizes conduct because two acts are required: loitering and failure to obey an order to disperse. But as the Illinois Appellate Court concluded, the ordinance "prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering." Pet. App. at 35a.

Third, the Fourth Amendment permits arrest only when a police officer has probable cause to believe that a person has committed or is about to commit a crime. *Henry v. United States*, 361 U.S. 98 (1959) The City's argument that the ordinance comports with this requirement because it only permits arrest after a person has disobeyed a police order to move along misses the point. A person cannot constitutionally be punished for disobeying a police order that is itself unconstitutional. *Wright*, 374 U.S. at 291-92. Accordingly, the Illinois Appellate Court correctly held that the ordinance amounts

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[14] The ordinance cannot survive the strict scrutiny required to abridge these rights. Even assuming, *arguendo* that the amelioriation of violent and drug-related crime is a compelling state interest, the means chosen by the City to further that end are not the least restrictive. As the Illinois Supreme Court noted, "[t]he city is not helpless in its war against the criminal activity of gangs. Many of the offensiveactivities the city claims the gang loitering ordinance will deter are already criminal acts." Pet. App. at 19a (citing statutes). In addition to these criminal remedies, the City also has available to its civil remedies, directed specifically at gang-related activities, under the Illinois Streetgang Terrorism Omnibus Prevention Act, 740 ILCS 147/1. Such laws serve the same ends as the ordinance at issue here, but do so by means "directed with reasonable specificity toward the conduct to be prohibited." *Coates*, 402 U.S. at 614.

to a transparent attempt to avoid the probable cause requirement by permitting arrest based on an individual's suspected association with a gang member, rather than on probable cause that a crime has been or is about to be committed.

Finally, the City's argument that an order to move along is not a "seizure" is disingenuous, as each of the respondents in this case was arrested pursuant to the ordinance, which commands police officers "promptly" to arrest any person who disobeys an order to move along.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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